

# Arent Fox

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VIA ELECTRONIC FILING

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, DC 20554

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Re: Written Ex Parte Communication, WC Docket 07-245

Dear Ms. Dortch:

On March 16, 2010, the Commission released the National Broadband Plan ("NBP"). Chapter 6 of the NBP includes recommendations concerning pole attachment regulations. Attached is an outline of potential modifications and comments to the pole attachment regulations, which are consistent with Recommendations 6.1 through 6.4 of the NBP. These potential modifications and comments are not intended to address every aspect of the pole attachment regulations, nor are they meant to recite all of the many matters currently addressed in the rules that are still warranted.

Respectfully submitted,



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# Arent Fox

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## **Attachment**

**NBP Recommendations 6.2 and 6.3** -- The FCC should implement rules that will lower the cost of the pole attachment “make-ready” process. The FCC should establish a comprehensive timeline for each step of the Section 224 access process....

### **Potential Modifications**

#### **Timelines (and Use of Approved Contractors, if Necessary)**

- The “application filing date” shall be the date the utility receives the pole attachment application from the attacher unless the attacher’s application contains material deficiencies of which the utility timely notifies the attacher. Within 14 days after receiving a pole attachment application, a utility shall notify the attacher of any material deficiencies in the application. In that event, the application filing date shall be the date the utility receives the attacher’s application, free of any material deficiencies.
- Within 30 days of the application filing date, a utility shall complete a pre-construction survey and immediately notify the attacher upon such completion. If an attacher has not received such notice within 30 days of the application filing date, the attacher shall have the right to use an approved contractor to perform the pre-construction survey and the utility shall cooperate with the approved contractor. If an approved contractor performs the survey, it shall immediately notify the utility of the survey results.
- Notwithstanding the above, if the utility has provided the attacher on or before the 30<sup>th</sup> day after the application filing date with a schedule that (i) sets forth the date the pre-construction survey will be completed, and (ii) reasonably assures the attacher that the pre-construction survey will be completed within 45 days after the application filing date, the attacher shall postpone using an approved contractor to perform the pre-construction survey until at least 45 days after the application filing date.
- If access is not granted within 45 days of the application filing date, the utility must confirm the denial in writing by the 45<sup>th</sup> day. The utility’s denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards. An attacher shall have the right to bring a complaint against the utility if it fails to grant access by the 45<sup>th</sup> day after the application filing date.
- A utility shall notify an attacher of the utility’s estimate for make-ready costs within 14 days of completion of the survey. If such estimate is not provided to an attacher within that timeframe, the length of time of any delay will be subtracted from the

required time by which the utility must complete the make-ready work (see the next bullet point below).

- A utility must complete the make-ready work within 45 days after it receives from the attacher (i) all undisputed make-ready costs, and (ii) if there is a dispute as to the proper amount of any specific make-ready costs, at least half of the disputed make-ready costs set forth in the invoice. For both pre-construction survey and make-ready work, a utility is permitted to perform the work itself or use an approved contractor.
- If a utility fails to meet the make-ready deadline specified in the above bullet points, an attacher may use an approved contractor to perform the make-ready work, and the utility shall cooperate with the approved contractor and refund the attacher for any prepaid make-ready payments.
- For each locality in which a utility owns poles, the utility shall provide a list of at least three approved contractors who do business in that locality and who can be used by the utility or by attachers for survey or make-ready work. An attacher may also use any other contractor that a utility uses to perform survey or make-ready work.
- In connection with a pole attachment request by an attacher, within a sufficient period of time to ensure that a utility can meet the deadline for make-ready work, a utility shall, to the extent applicable, notify existing attaching entities that (i) they will need to modify their attachments within 20 days after notice from the utility pursuant to a schedule issued by the utility; and (ii) if any existing attaching entity fails to timely do so, the utility (or an approved contractor retained by the utility or the attaching entity) shall have the right to modify such attachment.
- A utility should not be permitted to delay an approved contractor's performance of pre-construction survey or make-ready work, even if the utility's oversight personnel are not available at the time the approved contractor wishes to perform such work.

#### Other Issues Related to Charges

- A utility's estimate of its make-ready costs shall be reasonable and sufficiently detailed to permit an attacher to fully understand all costs involved. Upon request by an attacher, a utility shall be required to promptly provide proof of make-ready costs and an itemized cost accounting of such costs.
- An attacher shall not be responsible for, and a utility's make-ready invoice to an attacher shall not include the following: (i) any portion of the make-ready costs that are attributable to the correction of pre-existing pole violations of any applicable laws or the NESC, not caused by the attacher, or (ii) any portion of the make-ready expense not necessary to ensure compliance with all laws and the NESC.
- Where an approved contractor retained by the attacher performs pre-construction survey or make-ready work, a utility may only charge the attacher its costs to oversee such work if it provides an attacher with prior notification (*i.e.*, before the work is

performed) that it intends to charge the attacher for such oversight, and of the amount of such charge.

*Boxing, Extension Arms, Safety Standards and Clarification*

- A utility shall grant an attacher's request for boxing of poles unless (i) for the class of pole involved, the utility does not use boxing for its own attachments, nor permit it for third-party attachments; or (ii) such boxing cannot safely be accessible by bucket trucks, ladders or emergency equipment, or such use of boxing would violate the NESC. A utility shall grant or deny a request for boxing within 30 days of the request.
- A utility shall grant an attacher's request for use of extension arms for poles unless (i) for the class of pole involved, the utility does not use extension arms for its own attachments, nor permit it for third-party attachments; or (ii) such use of extension arms would violate the NESC. A utility shall grant or deny a request for extension arms within 30 days of the request.
- A utility may not require an attacher to comply with a standard set by the utility relating to safety that is in addition to or in excess of the standards set forth in the NESC or any applicable laws unless the utility receives express approval from the Commission or its state public utility commission to specifically impose that standard. (Note: Otherwise a utility can impose any standard whatsoever under the guise of safety, and thereby greatly increase the cost of providing broadband, without any verification that the utility's alleged justification is correct).
- Clarification: The need to perform make-ready work prior to a pole attachment does not mean that there is insufficient capacity on the pole for the pole attachment.

**NBP Recommendation 6.3** -- The FCC should ... reform the process for resolving disputes regarding infrastructure access.

### **Potential Modifications**

#### **Disputes and Complaint Process**

- Disputed survey or make-ready work shall continue to the extent possible during a dispute. Where the dispute concerns costs (e.g. make-ready costs), the work shall continue, and the utility shall be responsible for meeting all deadlines, as long as the attacher pays all undisputed amounts owed, and at least half of any disputed amounts invoiced (overpayments are subject to refund).
- With respect to a pole attachment complaint, if during the pendency of the dispute the attacher has not been issued a pole attachment license by the utility, the following expedited procedures will apply: a respondent shall have 15 days from the date the complaint was filed within which to file a response, and the complainant shall have 7 days from the date the response was filed within which to file a reply. If during the pendency of the dispute, the attacher has been issued a pole attachment license by the utility, a respondent shall have 30 days from the date the complaint was filed within which to file a response and the complainant shall have 20 days from the date the response was filed within which to file a reply.
- The Commission shall render a final decision within 90 days after the filing of a pole attachment complaint if during the pendency of the dispute the attacher has not been issued a pole attachment license by the utility (e.g., the dispute concerns denial of, or failure to provide, access).
- The Commission shall issue a public notice after resolving any pole attachment dispute, which sets forth the operative legal principles that formed the basis for the resolution of that dispute. All persons and entities shall ensure that they act in accordance with such legal principles set forth in the public notice.
- Unless it has received a waiver or other authority from the Commission, a utility's failure to comply with a deadline in the pole attachment rules shall be deemed to be a violation of 47 USC § 224, and an attacher can file a complaint once such a violation has occurred (and an attacher's damages shall be deemed to equal at least 50% of the make-ready charges that it was required to pay to the utility or an approved contractor).

**NBP Recommendation 6.1** -- The FCC should establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 of the Communications Act of 1934, to promote broadband deployment.

### **Potential Modifications and Comments**

The Commission should retain the cable rate for cable services, and make effort to ensure that the telecommunications rate equals, or at the very least does not materially exceed, the cable rate. In that regard, the Commission should

- Forbear from requiring telecommunications providers from paying more than the cable rate if the Commission has the power to do so.
- With respect to the calculation of costs under 47 U.S.C. § 224(e)
  - A lower rate of return should be included.
  - The Commission should determine whether maintenance or administrative costs in connection with pole attachments are overstated.
  - The Commission should determine whether other factors warrant a reduction in the calculation of costs.

**NBP Recommendation 6.4** -- The FCC should improve the collection and availability of information regarding the location and availability of poles, ducts, conduits and rights-of-way.

**Potential Modifications**

- A utility shall ensure that its pole loading calculation methodology is publicly available on its website.
- If a utility does not have a website, it shall provide its pole loading calculation methodology promptly upon a request from an attacher.